SUPREME COURT, U.S.
MAR 15 1967
JOHN F. DAVIS, CLERK

No. 1066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

OSCAR GRUSS & SON, *Appellant,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

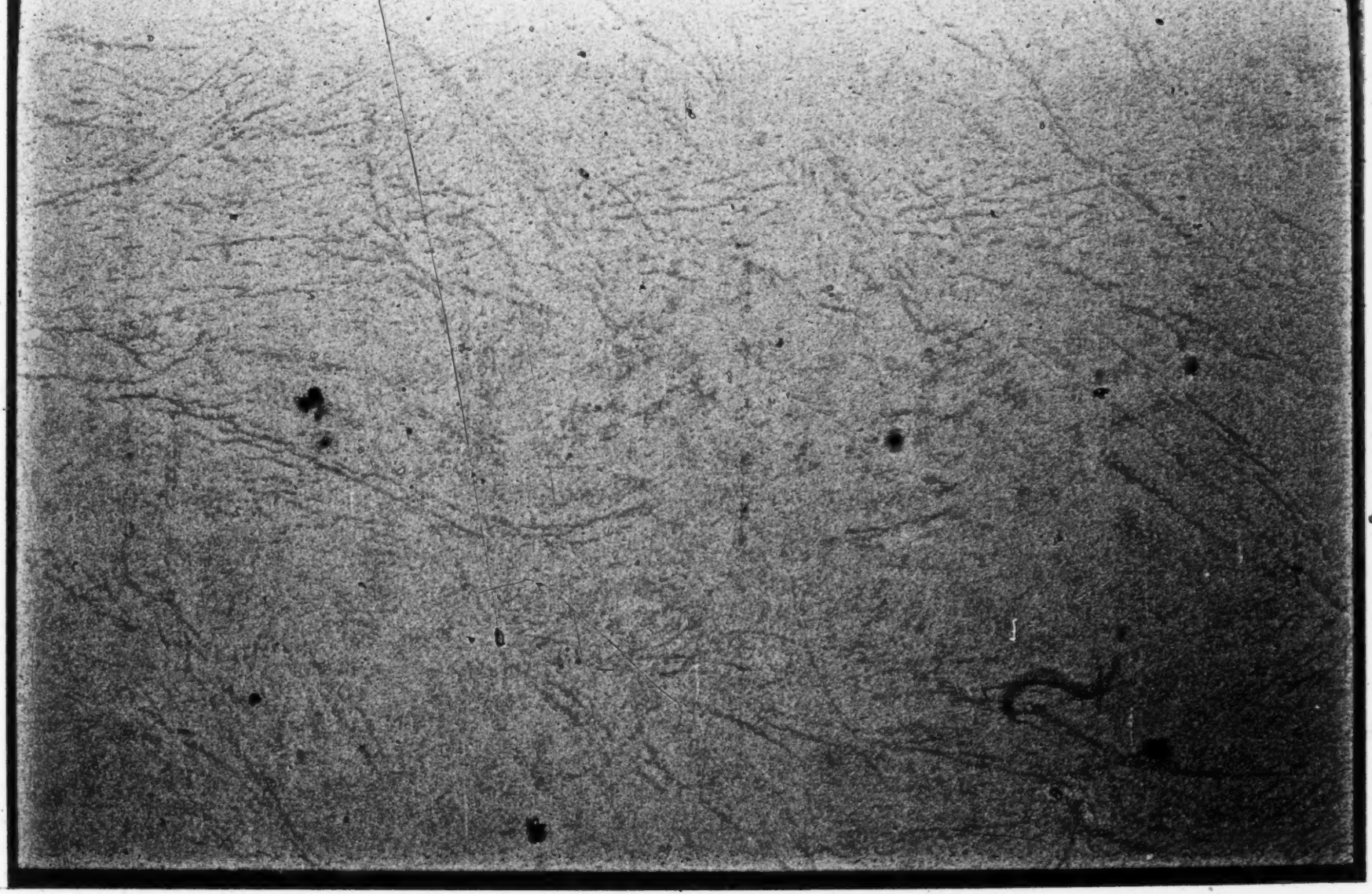
MOTION TO AFFIRM

HUGH B. COX
HENRY P. SAILER
701 Union Trust Bldg.
Washington, D. C. 20005
Attorneys for Appellees
The Pennsylvania Railroad
Company and The New York
Central Railroad Company

Of Counsel:

WINDSOR F. COUSINS
The Pennsylvania
Railroad Company

JAMES B. GRAY
The New York Central
Railroad Company



INDEX

	Page
Statement	2
Argument	7
I.	7
II.	14
Conclusion	16

CITATIONS

Cases:

Alleghany Corp. v. *Breswick & Co.*, 353 U.S. 151 11
Chicago Junction Case, 264 U.S. 258 ..... 12, 13
Meyer v. *Fleming*, 327 U.S. 161 14
New York Central Securities Corp. v. *United States*, 54 F.2d 122 (S.D.N.Y. 1931), *aff'd*, 287 U.S. 12 ..... 10, 11
Pittsburgh & West Virginia Railway Co. v. *United States*, 281 U.S. 479 ..... 8, 9, 10, 13
Alexander Sprunt & Son, Inc. v. *United States*, 281 U.S. 249 ..... 8, 12, 13

Statutes:

Bankruptcy Act:

§ 77, 11 U.S.C. § 77 ..... 2, 3, 5

Interstate Commerce Act:

§ 5(2), 49 U.S.C. § 5(2) 3

Judicial Code:

§ 212, 28 U.S.C. § 2323 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1060

OSCAR GRUSS & SON, *Appellant,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellees The New York Central Railroad Company (Central) and The Pennsylvania Railroad Company (Penn), pursuant to Rule 16(1)(c) of the Rules of this Court, move that the Final Judgment of the District Court granting summary judgment dismissing appellant's complaint be affirmed on the ground that the questions presented are so insubstantial as not to require further argument.

STATEMENT

Appellant, Oscar Gruss & Son (Gruss), is an investment banking firm and a member of the New York Stock Exchange. It has acquired as a speculator approximately 14 percent of the First and Refunding Mortgage 4 percent bonds of The New York, New Haven and Hartford Railroad, which is in reorganization in a proceeding under Section 77 of the Bankruptcy Act now pending in the United States District Court for the District of Connecticut.[1] Gruss is appealing from a unanimous decision of a three-judge district court convened in the Southern District of New York, entered November 28, 1966, that granted summary judgment dismissing an action brought by Gruss to set aside certain orders of the Interstate Commerce Commission.

The Commission orders that appellant sought to attack, so far as is here pertinent, authorized the merger of Penn and Central on the condition that the merged carrier agree to include both the freight and passenger operations of the New Haven "upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission." 327 I.C.C. at p. 553. The orders also provided that "in the event the parties are unable to reach an agreement (and subject to approval by

---

[1] On August 25, 1965, Judge Anderson, sitting as a district judge in charge of the Section 77 proceeding, denied the petition of appellant to intervene in that proceeding, stating: "The recognition of the petitioner's interests and the right to have them protected are in no wise lessened by the fact that, as a speculator in these bonds, the petitioner was unable to show how its intervention would particularly aid or benefit the reorganization proceedings."

the Bankruptcy Court) such inclusion shall be upon such fair and equitable terms and conditions as the Commission may impose." *Ibid.*

Appellant's challenge to the orders in the District Court rested solely on the fact that they permit consummation of the merger prior to actual inclusion of the New Haven in the merged company.

The Penn-Central merger case was instituted before the Commission on March 9, 1962, by the filing by Penn and Central of an application seeking authority to merge pursuant to Section 5(2) of the Interstate Commerce Act. On June 19, 1962, the United States District Court for the District of Connecticut, in the exercise of its powers under Section 77 of the Bankruptcy Act, authorized the Trustees of the New Haven to seek inclusion of that railroad in the proposed Penn-Central system. Thereupon, the Trustees intervened in the Penn-Central merger proceedings, filed with the Commission a petition for inclusion of the New Haven's freight operations and actively participated in the ensuing hearings.

In a brief submitted to the Examiners on June 1, 1964, the Trustees urged that inclusion of the New Haven's freight operations should be made a condition precedent to consummation of the Penn-Central merger. Soon after the close of the hearings before the Examiners, however, the Trustees undertook negotiations with Penn and Central and eventually entered into a Memorandum of Understanding, filed with the Reorganization Court on April 7, 1965, which contemplated, *inter alia*, abandonment of their demand for actual inclusion of the New Haven freight operations prior to consummation of the Penn-Central merger.

Shortly before the filing of this Memorandum of Understanding, on March 29, 1965, the Examiners in the Penn-Central case issued their recommended report. So far as the New Haven was concerned, the report recommended that that road be given the right to have its freight operations included in the Penn-Central system, but that actual inclusion should not be required as a condition precedent to consummation of the merger.

The Trustees filed no exceptions to the Examiners' recommendations. On the contrary, on August 16, 1965, in a reply to the exceptions of certain other parties they specifically supported the Examiners' conclusion that inclusion of the New Haven's freight operations should take place subsequent to the merger.

On April 21, 1966, the Trustees, Penn and Central entered into an agreement, subject to the approval both of the Commission and the Reorganization Court, embodying and amplifying the terms of the 1965 Memorandum of Understanding. That agreement, filed with the Reorganization Court on the same date, provided, consistent with the Examiners' recommendations, for inclusion of the New Haven's freight operations and not its passenger operations, and that subsequent rather than prior to the merger.

On April 27, 1966, the Commission released its order in the Penn-Central merger case. That order, although otherwise adopting the Examiners' recommendations as to the New Haven, required inclusion not only of its freight operations but of its passenger service as well. 327 I.C.C. at p. 553. Penn and Central accepted this additional burden and agreed with the Trustees to modify the agreement theretofore made

between them to reflect this condition, without reducing the consideration provided for in the agreement.

On September 13, 1966, the Trustees petitioned the Reorganization Court for authority to file with the Commission, pursuant to Section 77 of the Bankruptcy Act, a plan for reorganization. A hearing was held on October 10, 1966, in which appellant participated. The petition was granted on October 24, 1966, and three days later the proposed plan was filed with the Commission. Hearings with respect to this plan were commenced before an Examiner on January 16, 1967, and are still proceeding.

Although it was clear by April 1965 both that the Examiners had recommended that actual inclusion of any part of the New Haven's operations should not be required as a condition precedent to consummation of the Penn-Central merger and that the Trustees had determined to take a like position, appellant made no effort to assert its present contrary position until more than fifteen months later. It was not until July 11, 1966, that appellant first sought to participate in the Penn-Central merger case. On that day it filed a Petition for Leave to Intervene and Petitions for Reconsideration, Further Hearing, and Modification of the Commission's Order to require inclusion of the New Haven at the time of and as a condition precedent to consummation of the merger.

On September 19, 1966, the Commission issued a report and order on reconsideration. So far as appellant's petitions are concerned, the Commission noted that "Gruss seeks intervention to press for the immediate inclusion of NH in the merged system," that "the relief now requested is not justified," but that "Gruss,

as a substantial investor in NH securities, undoubtedly has an interest in the ultimate disposition of the bankrupt carrier's operations" and that "therefore, to obviate the need for another petition in order to participate in the inclusion proceeding, we will permit Gruss to intervene now and become a party herein * * *." 328 I.C.C. at pp. 306-07. The Commission concluded that "Oscar Gruss & Son should be permitted to intervene herein for the limited purposes described above" (328 I.C.C. at p. 330), and its order recited that appellant and another would-be intervenor should "be, and they are hereby, permitted to intervene and become parties herein for the limited purposes set forth in the said report on reconsideration, and that the petitions of these two intervenors be, and they are hereby, denied in all other respects."

In neither its April 27 or September 19 order did the Commission pass in any way on the terms of the New Haven inclusion in the Penn-Central system. That matter is now being considered in Commission hearings in which appellant has been granted the right to participate and is in fact participating.

On October 18, 1966, appellant filed its complaint in the court below against the United States and the Interstate Commerce Commission, asking that the Commission's orders be set aside insofar as they authorized consummation of the Penn-Central merger prior to actual inclusion of the New Haven. A bondholders committee intervened as plaintiff. The New Haven Trustees, Penn and Central intervened as defendants, and the latter two parties, together with the Commission, moved to dismiss the complaints. On November 28, 1966, the District Court granted this relief by enter-

ing a summary judgment, holding on the basis of decisions of this Court that because appellant's claims of injury were based on the apprehension of injury to the corporation in which it is a security holder, it lacked standing to maintain the action, and that in any event the Commission had acted "reasonably and within its powers." Juris. Statement, p. A-14.

ARGUMENT

Appellant argues at length in its Statement of the Case that the terms of the reorganization plan proposed by the Trustees of the New Haven are unfair. This challenge to the terms of the proposed reorganization plan is wholly premature. Those terms have not yet been passed upon by either the Commission or the Reorganization Court. They are currently being considered in a proceeding in the Commission in which appellant has been granted the right to participate and is participating. Appellant itself implicitly concedes that the fairness of the terms for inclusion of the New Haven in Penn-Central is not at issue here by omitting from its Statement of Questions Presented any question relating to those terms.

I.

Although appellant states seven questions as being presented, the only questions that it attempts to show to be substantial are all but facets of a single question. That question is whether a bondholder of a railroad in bankruptcy reorganization has standing to institute a suit to enjoin and set aside orders of the Interstate Commerce Commission on the basis of allegations that the orders may result in injury to the debtor railroad and thereby adversely affect the financial interests of the bondholder.

We submit that this question has long been settled adversely to appellant. Thirty-seven years ago this Court unanimously held in *Pittsburgh & West Virginia Railway Co.* v. *United States,* 281 U.S. 479, that a stockholder in a railroad lacked standing to bring an action to set aside an Interstate Commerce Commission order claimed to threaten the "financial stability" of the railroad, and that the fact that the appellant had been permitted to intervene in the Commission proceeding in which the order had been issued did not affect the result. Speaking through Mr. Justice Brandeis, the Court stated:

> "*First.* The District Court held that the appellant was entitled to bring this suit under the Urgent Deficiencies Act to set aside the order, because it had intervened in the proceedings before the Commission, and because it is a connecting carrier and a minority stockholder of the Wheeling. The court erred in so holding. The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it, *Alexander Sprunt & Son* v. *United States, ante,* p. 249. Nor does the mere fact that its lines connect with those of the Wheeling near the City of Pittsburgh, Pennsylvania, entitle it to bring the suit. Its lines do not extend to Cleveland; and there is no suggestion that the order can affect it as carrier. Finally, the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or

> lawsuit of his corporation. Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors. The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order. The bill should have been dismissed without inquiry into the merits." [footnotes omitted.] 281 U.S. at p. 486.

Appellant seeks to avoid the controlling effect of the *Pittsburgh* case by pointing to the sentence in the quoted passage where the Court noted that "unlike orders entered in cases of reorganization and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors." This language, however, affords no comfort to appellant. It refers to cases of reorganization or of acquisition of control in which the Commission's order determines whether the terms of the proposed transaction are fair and equitable to the stockholders or creditors of the corporation or corporations involved and thereby directly affects "the interests of investors."[2] The orders that appellant seeks to attack here embody no determination on the terms on which the New Haven is entitled to be acquired by Penn-Central. There will ultimately be a Commission decision on those terms that will be embodied in a different order. When that order is made it will be time enough for appellant to assert its right

---

[2] As the District Court pointed out: "The 'some cases' phrase was illuminated by a footnote referring to various I.C.C. decisions considering the fairness of acquisitions to security holders of the roads to be acquired." Juris. Statement, p. A-9.

to be heard in an appropriate forum with respect to the fairness of the terms of inclusion. No question of the fairness of those terms is presented here.

Subsequent decisions have further illuminated the distinction drawn in the quoted passage between an order that can properly be said to "deal with" the interests of investors and one that merely affects such interests by affecting the corporation, and show that appellant's claim here falls into the latter category and not the former. *New York Central Securities Corp.* v. *United States,* 54 F.2d 122 (S.D.N.Y. 1931), *aff'd,* 287 U.S. 12, involved an attack on a Commission order authorizing the New York Central Railroad to lease the properties of certain railroads in which it was a majority stockholder. The plaintiff was a minority stockholder in both the Central and the lessor roads. In its former capacity it complained of a condition imposed by the Commission on the proposed transactions requiring acquisition by the Central of certain short line railroads. The Court ruled that the plaintiff had no standing to assert this claim "for clearly plaintiff cannot have sustained any injury in this respect other than indirectly through the lessee corporation", citing the *Pittsburgh* case. 54 F.2d at p. 125. The plaintiff also claimed injury as a stockholder of the lessor corporations, however, and the court found it to have standing in this capacity because under the terms of the particular leases the payments of rental dividends were to be made directly to the minority stockholders of the lessors and hence the plaintiff's alleged injury was "not merely derivative through its ownership of stock, but is an independent injury to itself as a member of a class created by the leasing agreements between lessors and lessee." 54 F.2d at p. 126.

Precisely the same line was drawn by this Court in *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151. In that case common stockholders of Alleghany sued to review Commission orders (a) directing that Alleghany should be "considered as a carrier" and therefore regulated by the Interstate Commerce Commission, (b) authorizing Alleghany to issue a new series of preferred stock, and (c) authorizing a merger of certain companies in which Alleghany held indirect stock interests. This Court held that the plaintiffs had standing to challenge the order of the Commission authorizing the issuance of a new issue of preferred stock because that stock was convertible and therefore threatened to dilute the equity of the common stockholders. It further held that since the plaintiffs had acquired standing to seek judicial review because of this threatened injury to their financial interests as common stockholders they could also challenge the Commission's order conferring on Alleghany the status of a "carrier" under the Interstate Commerce Act because the power of the Commission to approve the proposed stock issue depended on the validity of its order as to the status of Alleghany. 353 U.S. at pp. 159-60.

At the same time, however, this Court held that the plaintiffs were not "interested parties" entitled by statute to an evidentiary hearing before the Commission with respect to the merger transaction and the status order because "the merger agreement had no special effect on appellees or on common stockholders of Alleghany" (citing *New York Central Securities Corp.* v. *United States, supra*) and the status order did not "by itself pose any individualized threat to the welfare of the appellees." 353 U.S. at pp. 172-75.

In support of the proposition that the court below erred in denying it standing, appellant relies primarily on the *Chicago Junction Case,* 264 U.S. 258. Unlike the present case, however, the plaintiffs in *Chicago Junction* were not security holders in a railroad attempting to sue on the basis of threatened injury to the corporation, but rather a group of railroads suing in their own right to set aside an order giving one of their competitors a monopoly and subjecting them "to serious disadvantage and prejudice." 264 U.S. at p. 266. The only possible relevance of that case lies in the fact that the opinion contains dicta suggesting that a party permitted to intervene before the Commission has an automatic right thereafter to institute a suit to challenge any order issued. Even if it is assumed, however, that appellant here was in fact an intervenor before the Commission with respect to the orders that it seeks to challenge,[3] *Chicago Junction* would not support its position, for the implication that appellant seeks to draw from its dicta has been explicitly repudiated in subsequent decisions of this Court.

In *Alexander Sprunt & Son, Inc.* v. *United States,* 281 U.S. 249, the appellants were shippers who alleged that they had lost a competitive advantage by reason of a Commission order directing certain carriers to cease and desist from discriminatory rate practices. This Court held that the appellants' interest in their competitive advantage entitled them to intervene in the Commission proceeding and that if they did so they were also entitled to intervene as of right in any suit involving the validity of the order entered by the

---

[3] But see footnote 3 of the District Court's opinion (Juris. Statement, p. A-16), which recognizes that the validity of this assumption is at best doubtful.

Commission in the proceeding. But the Court then added (281 U.S. at p. 255):

> "But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier. In the case at bar, the appellants have no independent right which is violated by the order to cease and desist."

The Court distinguished the *Chicago Junction Case* on the ground that there "an independent legal right of the plaintiff was affected by the order which it was sought to set aside." 281 U.S. at p. 257.[4]

The holding in *Sprunt* was specifically approved and applied in *Pittsburgh & West Virginia Railway Co.* v. *United States,* 281 U.S. 479, 486:

> "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it." (citing *Sprunt*).

The cases discussed make it abundantly clear, we submit, that the District Court was correct in holding

---

[4] The *Sprunt* case also disposes of appellant's argument based on 28 U.S.C. § 2323. The predecessor of that statute, Section 212 of the Judicial Code, was specifically considered in *Sprunt,* and found not to confer standing to maintain an independent suit to review a Commission order on every intervenor in the administrative proceeding.

that appellant lacked standing to maintain this independent action on the grounds pleaded in its complaint.

Appellant itself concedes that "it may well be that the Trustees could and did preempt the field of participation in the Penn-Central merger proceedings, so long as they demonstrated a willingness to fight for the common interests of all creditors." Juris. Statement, p. A-26. It argues, however, that its interests and those of the other first mortgage bondholders have been abandoned by the Trustees and that therefore it is entitled to bring this action to protect those interests.

This is not a case where trustees are charged with self-dealing or fraud or other wrongdoing allegedly designed to benefit themselves at the expense of the beneficiaries it is their duty to represent. Even if it were, however, appellant's remedy would lie not in an action like that which it seeks here to maintain, but rather in appropriate proceedings before the Reorganization Court to oust the Trustees or to seek instructions for them. This Court has stated that the bankruptcy court has "exclusive authority to determine how causes of action which have become a part of the bankruptcy estate shall be enforced" (*Meyer* v. *Fleming*, 327 U.S. 161, 169), and the District Court was manifestly correct in holding that "power to instruct them [the Trustees] or to turn over the job to someone else is vested exclusively in the bankruptcy court." Juris. Statement, p. A-13.

II.

The only issue that Gruss presented to the Commission in its petition for reconsideration was whether inclusion of the New Haven should be made a condi-

tion precedent to consummation of the Penn-Central merger. In its petition, Gruss did not argue that the New Haven stood in need of interim protective conditions similar to those accorded to other railroads, nor did it ask the Commission for a hearing on whether such protective conditions should be prescribed and, if so, what their character should be. Hence, as the District Court found, on any view the only issue open on judicial review in that court was whether the Commission acted lawfully in refusing to postpone consummation for the long period that will necessarily be required to dispose of the inclusion application. See Juris. Statement, p. A-14.

The District Court properly held that in taking this position the Commission had acted "reasonably and within its powers." *Ibid.* The Commission had found that resolution of the problems presented by inclusion of the New Haven "would require time and much personal endeavor on the part of all those interested, thus precluding immediate inclusion." 328 I.C.C. at p. 306. It had found also that "a substantial postponement of consummation of the merger" would jeopardize the merger and thereby jeopardize any solution of the New Haven problem other than liquidation. 328 I.C.C. at p. 312. These considerations alone provide ample support for the action of the Commission, and for the refusal of the District Court to disturb that action.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

HUGH B. COX
HENRY P. SAILER
701 Union Trust Bldg.
Washington, D. C. 20005
Attorneys for Appellees
The Pennsylvania Railroad
Company and The New York
Central Railroad Company

Of Counsel:

WINDSOR F. COUSINS
The Pennsylvania
Railroad Company

JAMES B. GRAY
The New York Central
Railroad Company